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Dr Albert Sanchez-Graells

**Collaborative Cross-border Procurement in the EU:
Future or Utopia?**

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Collaborative Cross-border Procurement in the EU: Future or Utopia?

*Dr Albert Sanchez-Graells**

Abstract

Collaborative public procurement has been gaining traction in recent years and could be considered at the spearhead of public procurement reform and innovation. The 2014 reform of the EU public procurement rules (mainly Directive 2014/24) has expanded the tool-kit available to contracting authorities willing to engage in joint or centralised procurement activities, and in particular in cross-border procurement collaboration. In a push forward, and as part of the *Strategy for a deeper and fairer single market* in its larger context, the European Commission is developing a policy to facilitate and promote cross-border collaborative public procurement in the European Union.

This paper adopts a sceptical approach and critically assesses the political, economic and in particular legal factors that can facilitate or block such development. To do so, it focuses on a case study based on a theoretical scenario of cross-border collaboration between centralised purchasing bodies in different EU Member States. The paper ultimately aims to establish a blueprint for future legal research in this area, in particular regarding the emergence of trans-EU public law.

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Disclaimer: I participated as an expert in two brainstorming sessions organised by the European Commission, first on 'Public procurement aggregation—in particular Central Purchasing Bodies (CPBs)' on 7 May 2015, and second on 'Public procurement aggregation /cooperative procurement' on 20 October 2015. I am also a member of the European Commission's Stakeholder Expert Group on Public Procurement (E02807, 2015–2018). All views are personal and in no way represent the conclusions reached at any of these meetings or the position of the European Commission. Upon having read an initial draft of this paper, the European Commission has insisted that I clarify that *'the Action Plan on cooperative procurement does not represent the official position of the Commission and this point was made clear at the meeting; it is an internal document prepared by the services of the Commission which was shared with participants in the brainstorming with the objective of exchanging views with some stakeholders and some academics'*.

1. Introduction

The relevance of public procurement as a main lever for the achievement of the *Europe 2020* strategic goals has been increasing in importance since it was first singled out in the 2010 *Monti Report on the future of the single market* as a key policy area to foster economic recovery and sustainable growth.¹ This instrumental use of public procurement as a tool of economic policy and for the pursuit of horizontal or secondary goals (green, social, innovative procurement) has received yet new emphasis in the *Strategy for the upgrade of the single market* of October 2015,² where the Commission stresses that

Public procurement represents around 19% of EU GDP, with over EUR 2.3 trillion being spent each year by public authorities and utilities. In 2014, the EU adopted a major overhaul of the EU procurement framework, simplifying procedures, making the rules more flexible and adapting them to better serve other public sector policies, in particular innovation. This was aimed at making public procurement more efficient and strategic, fulfilling the principles of transparency and competition to the benefit of both public purchasers and economic operators, in particular SMEs.³

Within this general framework, the European Commission's second-tier *Strategy on Public Procurement* is premised on the basis that '*as the biggest single spender in the EU, the public sector can use procurement to drive key EU2020 horizontal policies, such as those aimed at creating a more innovative, green and socially-inclusive economy*'.⁴ The exercise of buyer power and, in particular, the development of centralised public procurement strategies is thought to be one of the ways in which the pursuit of those economic and horizontal or secondary goals can be more easily attained. Thus, when it comes in particular to the use of collaborative public procurement, the Commission further stresses that

The aggregation of public purchasing has started to take hold across the EU. Demand aggregation refers to contracting authorities or others operating through Central Purchasing Bodies (CPBs) which act as wholesalers or intermediaries.

¹ M Monti, *A New Strategy for the Single Market. At the Service of Europe's Economy and Society*, available at http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf (visited 11.02.2016). See A Sanchez-Graells, 'Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies?' (2016) 22(2) *European Public Law*, forthc.

² European Commission, *Upgrading the Single Market: more opportunities for people and business*, COM(2015) 550 final, available at <http://ec.europa.eu/DocsRoom/documents/14007?locale=en> (visited 11.02.2016).

³ Ibid, para 3.2, emphasis added.

⁴ European Commission, *Public procurement strategy*, available at http://ec.europa.eu/growth/single-market/public-procurement/strategy/index_en.htm (visited 11.02.2016).

Because aggregators manage increasing shares of public procurement markets, they are becoming indispensable players in promoting public procurement reform. Moreover, given their different mandates at political, policy and market level, CPBs are uniquely positioned to implement strategic or innovative procurements. Their role in the standardisation of public procurement processes and market insight also play an important role for the professionalization of public administrations. The Commission intends to support the dissemination of good practice and promote the use of innovative procurement by CPBs and other forms of aggregation of demand.⁵

Furthermore, the Commission considers that '*CPBs' procurement could multiply the effect on cross-border trade since a higher value of procurement contracts is expected to attract higher competition, including suppliers from other MS*'.⁶ It also stresses that '[g]iven their expertise, CPBs located in different MS are the ideal candidates for applying' the provisions of the new Directives on joint cross-border procurement.⁷ Therefore, the Commission aims to promote cross-border collaboration between institutions already engaging in centralised public procurement at a national level.

Complementing this overall goal and in a third-tier strategic effort, the services of the Commission are working on a more detailed *Proposal for an action plan on cooperative procurement* with the fundamental aim of enabling Member States '*most exploit cooperative procurement for modernisation of public procurement*', with a particular focus on the activities of CPBs and other forms of joint public procurement.⁸ One of the main objectives of the proposal for an action plan is to '*foster the use of joint cross-border procurement (JCBPP)*', which the Commission justifies on the basis that

JCBPP is limited to specific cases (... but it could have an important policy impact. It requires close coordination between administrations from different [Member States, MS], forces buyers to design procedures that are open to suppliers from different MS, acquaints CPBs as well as buyers (suppliers) with receiving (submitting) cross-border offers and documents. Moreover, JCBPP presupposes a reduced risk of corruption given the higher number of parties involved than a traditional procedure. Furthermore, consolidating practices and experiences of JCBPP may contribute to develop innovative PP by allowing buyers to derive

⁵ Ibid, emphasis added.

⁶ European Commission, *Brainstorming on the possible development of an EU policy on aggregation, with a focus on Central Purchasing Bodies (CPBs)*, 16 April 2015, on file with author, 8.

⁷ Primarily, Articles 37 to 39 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94 65–242. These are discussed in detail in section 4 below.

⁸ European Commission, *Draft Proposal for an action plan on cooperative procurement* of 8 October 2015, on file with author. The final version of the *Proposal for an action plan on cooperative procurement* is of 5 February 2016, on file with author.

maximum benefit from the potential of the Single Market. These benefits would include economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority. Moreover, the JCBPP could be the real qualitative jump of Internal Market integration—it forces the buyer to think more openly rather than with a “local” perspective.⁹

JCBPP is limited to specific cases but it could have an important policy impact. It requires close coordination between administrations from different [Member States, MS], forces buyers to design procedures that are open to suppliers from different MS, acquaints CPBs as well as buyers (suppliers) with receiving (submitting) cross-border offers and documents. Moreover, JCBPP presupposes a reduced risk of corruption given the higher number of parties involved than a traditional procedure. Furthermore, consolidating practices and experiences of JCBPP may contribute to develop innovative PP by allowing buyers to derive maximum benefit from the potential of the Single Market. These benefits would include economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority. Moreover, the JCBPP could be the real qualitative jump of Internal Market integration—it forces the buyer to think “Europe” rather than “local”.

However, the proposal for an action plan recognises that JCBPP faces ‘*several challenges (legal, managerial, political, etc.) [and that f]or those reasons, most buyers are reluctant to be involved in cross-border [public procurement, PP] projects*’. To overcome that difficulty, the Commission considers that ‘*[i]t is necessary to engage with stakeholders to explain the potential of JCBPP for developing innovation, reduce transaction costs, and see PP from a European perspective. The provisions of the new Directive are not sufficiently well-known by practitioners. To foster their use by CAs and CPBs there is a need to support the relevant projects and share experiences*’.¹⁰ This seems to indicate that the Commission considers that the new EU procurement rules have created a complete and fully-functioning legal mechanism, or at least a workable one, which economic operators and contracting authorities simply need to be acquainted with and start using in order to unlock a new wave of integration of the single market for public procurement. To that end, and possibly to test the assumption in a more systematic way, the Commission has tendered a contract for a feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States, which results should be publicised towards the end of 2016.¹¹

⁹ *Proposal for an action plan on cooperative procurement* (n 8) 3. The October 2015 draft included the slightly different wording “it forces the buyer to think “Europe” rather than “local””, (n 8) 3.

¹⁰ *Proposal for an action plan on cooperative procurement* (n 8) 8.

¹¹ Contract notice 2015/S 215-391823, available at <http://ted.europa.eu/udl?uri=TED:NOTICE:391823-2015:TEXT:en:HTML&src=0> (visited 11.02.2016).

Overall, it seems clear that a fundamental driver of the European Commission's focus on collaborative procurement (both centralised and/or cross-border) as a high-priority area for policy action ultimately rests not only on the economic goals of the *Europe 2020 strategy*, but also on the complementary agenda of furthering single market integration and upgrading:¹² *ie* getting public buyers to think "Europe" rather than "local", and to approach public procurement from a European perspective. In a simplified manner, it seems fair to say that the Commission is betting on collaborative cross-border public procurement to be *the* catalyst that could unravel a significantly higher volume of cross-border procurement,¹³ while creating economic savings and organisational efficiencies along the way.¹⁴ Not in vain, the Commission has clearly stressed that '[e]fficient, effective and competitive public procurement is both a touchstone for a well-functioning internal market and an important opportunity for important efficiency and reputation gains in the public sector'.¹⁵

This is likely to gain traction as a policy direction that can appeal not only to Member States looking for collaborative efficiencies in procurement,¹⁶ but also to those Member States affected by significant problems of corruption or institutional shortcomings, which can perceive public procurement (and maybe *eProcurement* in particular) as a relevant opportunity for public sector reform.¹⁷ Moreover, this policy direction is likely to trigger significant support and enthu-

¹² This has been considered the *sole* purpose of EU public procurement rules; S Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2011–2012) 14 *Cambridge Yearbook of European legal studies* 1.

¹³ See A Sanchez-Graells, 'Are the Procurement Rules a Barrier for Cross-Border Trade within the European Market?—A View on Proposals to Lower that Barrier and Spur Growth', in C Tværnø, GS Ølykke & C Risvig Hansen, *EU Public Procurement: Modernisation, Growth and Innovation* (Copenhagen, DJØF, 2012) 107–133.

¹⁴ For discussion, see A Sanchez-Graells and I Herrera Anchustegui, 'Impact of Public Procurement Aggregation on Competition: Risks, Rationale and Justification for the Rules in Directive 2014/24', in R Fernández Acevedo & P Valcárcel Fernández (eds), *Centralización de compras públicas* (Madrid, Civitas, 2016) 129–163; I Herrera Anchustegui, 'Division into Lots and Demand Aggregation—Extremes Looking for the Correct Balance?', in GS Ølykke & A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Cheltenham, Edward Elgar, 2016) *forthc*; and *ibid*, 'Centralizing Public Procurement and Competitiveness in Directive 2014/24' (July 20, 2015), available at <http://ssrn.com/abstract=2633445> (visited 11.02.2016).

¹⁵ European Commission, *Public Procurement Action Plan*, update 01.11.2015, available at <http://ec.europa.eu/DocsRoom/documents/14341/attachments/1/translations/en/renditions/native> (visited 16.02.2016).

¹⁶ H Walker, F Schotanus, E Bakker & C Harland, 'Collaborative Procurement: A Relational View of Buyer–Buyer Relationships' (2013) 73(4) *Public Administration Review* 588–598.

¹⁷ For discussion, see AV Roman, 'Public Policy and Financial Management through E-Procurement: A Practice Oriented Normative Model for Maximizing Transformative Impacts' (2013) 13(3) *Journal of Public Procurement* 337–363.

siasm from CPBs and demand aggregators themselves¹⁸—which are structurally oriented towards growing and expanding their activities, including engaging in cross-border trade, if possible, and which can reap significant gains from raising their profile as policy actors rather than ‘mere’ commercial arms of the public sector/administration.

However, given the extremely significant legal and practical difficulties of implementing a collaborative cross-border procurement project,¹⁹ this policy has a certain *utopian* flair. It has been rightly stressed the policy ‘*seems to “use” the joint public procurement model for strengthening cross-border relationships without respecting the fact that the relevant knowledge about the connection between joint procurement and centralisation is missing*’, and that ‘*[i]t appears that European Union expects too much from joint public procurement procedures without exploring the additional causes and consequences deriving from the perspective of cross-border procurement*’.²⁰

This paper adopts the same sceptical approach and critically assesses the political, economic and in particular legal factors that can facilitate or block the development of collaborative and cross-border public procurement in the European Union. To do so, it focuses on a case study based on a theoretical scenario of cross-border collaboration between CPBs. In particular, this paper challenges the European Commission’s implicit assumption that the 2014 EU public procurement rules sort out all (or even most of) the legal difficulties involved in collaborative cross-border public procurement, so that it is only necessary to educate practitioners (on both the public and the private sectors) for this new type of strategic and single market-boosting procurement technique to explode and become widely utilised—or, at the very least, to become a significant policy lever. By identifying areas of legal uncertainty and deficient regulation (*legal lacunae*), the paper ultimately aims to establish a blueprint for future legal research in this area, in particular regarding the emergence of trans-EU public law.

After this introduction, theoretical scenarios of cross-border collaboration between CPBs are set out in section 2. Section 3 then discusses the political and economic implications that arise in such situations. Section 4 develops the legal analysis by identifying potential issues of conflicts of laws, both those that have a legal solution and those that are presently unregulated at the European (as well as international and domestic) level. In doing so, it also identifies a tentative

¹⁸ For background, see GL Albano & M Sparro, ‘Flexible Strategies for Centralized Public Procurement’ (2010) 1(2) *Review of Economics and Institutions* 1–32. See also J-Y Choi & H Kim, ‘Electronic government procurement reform: managing institutional reform—lessons from the Korean model’ (2013) 22(3) *Public Procurement Law Review* 116–134.

¹⁹ *Brainstorming on the possible development of an EU policy on aggregation* (n 6) 8, fn 27.

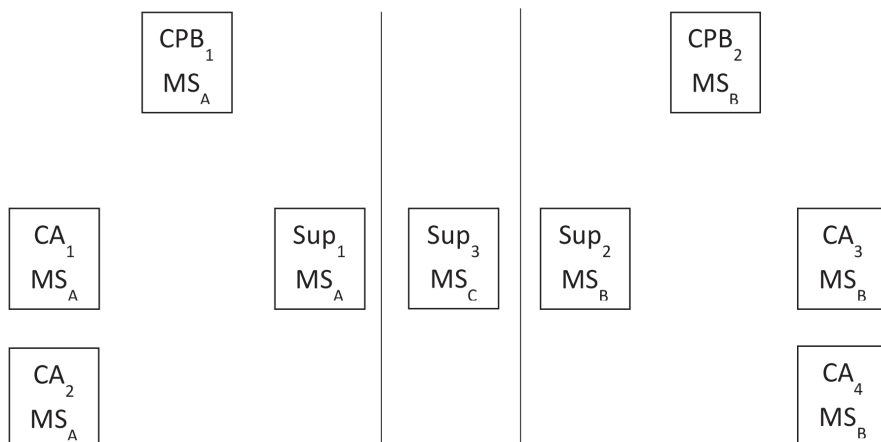
²⁰ T Tatrai, ‘Joint public procurement’ (2015) 16(1) *ERA Forum* 7–24.

blueprint for legal research aimed at overcoming the identified gaps in current EU law. Section 5 concludes.

2. Theoretical scenarios of cross-border collaboration between centralised purchasing bodies

In order to try to provide the most complete possible overview of the political, economic and in particular legal implications of collaborative cross-border public procurement mechanisms, it is worth focussing on theoretical scenarios that flesh out the several relationships that would arise where two CPBs based in different Member States (A and B) engaged in cross-border joint procurement on behalf of or for the benefit of other contracting authorities (CA) of those Member States. There could be alternative scenarios where CPBs in more than two Member States cooperated, or where they only dealt with each other commercially and did not establish any sort of direct interaction with non-CPB CAs in a cross-border setting. These arrangements would, however, trigger related issues to the ones discussed below. Therefore, without aiming to be exhaustive or prescriptive in the construction of the theoretical scenarios (for reality can be much more complex), and simply in order to provide as much context as possible for the discussion of political, economic and in particular legal implications of collaborative cross-border public procurement, the scenarios focus on mechanisms where ‘end-user’ CAs are involved in dealing with a CPB in a cross-border setting. They also include potential suppliers from both Member States (A and B), as well as from a third Member State (C). The discussion is limited to the supply of goods, but the same issues would arise in the case of services (even if the operational difficulties would probably be slightly different, and arguably more complex).

Figure 1. General or basic scenario.

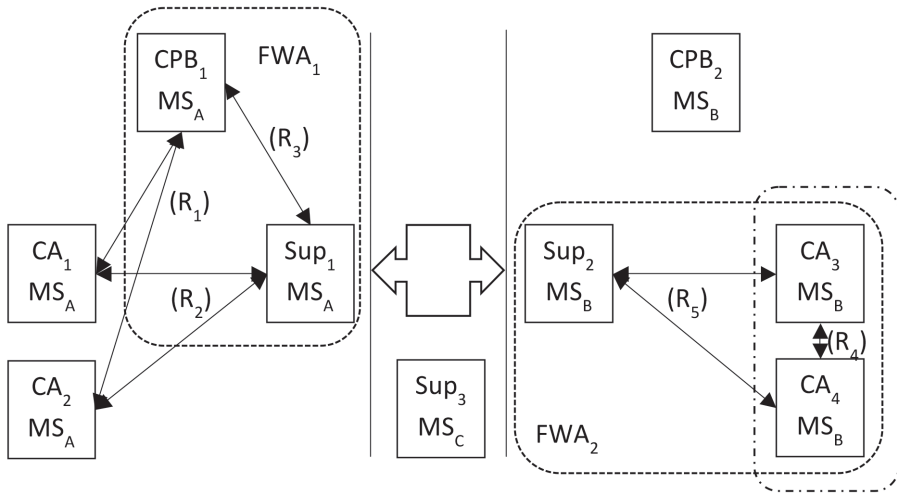


It goes without saying that where there is no cross-border element on the public sector side, that is, where only CAs and a CPB of the same Member State (either A or B) engage in centralised or collaborative procurement, all relationships remain purely domestic and are subjected to broadly the same political, economic and legal frameworks. If Member State A (MS_A) decides to promote or impose the use of its CPB₁, or if it allows its contracting authorities (CA₁ and CA₂) to jointly tender for contracts, these decisions are constrained by the same political factors (such as political preferences, issues of local/regional autonomy, perception of robustness and professionalization within the public sector at different levels, etc). Economically, the issues that will arise in the purely domestic situation are also constrained by the same elements (such as decisions on general budgetary allocations, common rules on public sector spending, reporting and allocation of costs, decisions on any horizontal or secondary procurement objectives, etc). From a legal point of view, in the domestic case, all public sector entities will be subjected to the same set of legal rules (whatever level of complication they entail) and the mechanisms for inter-administrative cooperation (between the CAs, or between them and the CPB) will either pre-exist the engagement with centralised or joint procurement, or will be developed *ad hoc* by MS_A in support of any such policies. The requirements derived from EU law boil down to compliance with Directive 2014/24—which, for these purposes, will be mainly oriented towards ensuring equal access for suppliers in Member States other than A (*ie* Sup₂ in MS_B and Sup₃ in MS_C) so that there is no restriction of competition or the underpinning free movement of goods in the internal market. The same analysis applies to the domestic context within MS_B (or any other MS).

In order to take a closer look at the economic and legal relationships established in the purely domestic scenarios, figure 2 represents a case of centralised

procurement in MS_A and a case of joint procurement in MS_B . For simplicity, both examples rest on the setting up of a framework agreement (FWA) with a single supplier (that is, a contractual framework for the supply of any amount of goods up to a specified maximum over a specified duration not exceeding 4 years), in the first case by the CPB_1 and, in the second case, jointly by the two collaborating contracting authorities CA_3 and CA_4 .

Figure 2. Scenario involving centralised public procurement in Member State A and joint/collaborative public procurement in Member State B



2.1. Basic centralised procurement scenario

If MS_A decides to make the use of its CPB_1 compulsory, or if the conditions for centralised purchasing services that CPB_1 offers to CA_1 and CA_2 prompts them to use FWA_1 , the various economic and legal relationships that ensue are as follows:

- R_1 are public-public legal relationships whereby CA_1 and CA_2 entrust or contract CPB_1 to carry out procurement on their behalf. These will usually be regulated under the domestic public or contract law applicable in MS_A . In many EU jurisdictions, this will be a heavily regulated administrative law relationship of delegation or collaboration. In other Member States this could be a completely unregulated relationship. It will usually not imply the transfer of funds, although some payment for the services provided by CPB_1 could be established.
- R_2 are public-private contractual relationships established between CA_1 and CA_2 with the supplier included in FWA_1 . These will take the form of call-offs,

which are also regulated to varying degrees of precision in different Member States. This will usually be the relationship that carries most of the economic obligations and, in particular, will trigger payment by CA₁ and CA₂ to Sup₁ for each call-off or on a periodic basis.

- R₃ is the FWA₁ itself, which is a contractual relationship between CPB₁ and Sup₁. This will set out the main conditions of the additional/supplementary contractual relationship that ensues with each call-off (R₂), and is thus closely related to R₂. Moreover, R₃ will often require Sup₁ to pay rebates or fees to CPB₁, either every time there is a call-off or on a periodic basis. Economically, then, the remuneration (sometimes conceived as funding) that CPB₁ receives from Sup₁ is, ultimately, a cost for CA₁ and CA₂ to resort to the centralised purchasing scheme set up by CPB₁. Should the supplier not be based in the same Member State (Sup₃), FWA₁ will usually resolve any issues of cross-border conflict of laws in R₃ and R₂ by imposing explicit clauses of submission of Sup₃ to the law of MS_A (not only in terms of the administrative/public law regulating the tender of the FWA₁, but also and more importantly for some purposes, in terms of the contract and private law applicable to the contract FWA₁ *itself* and its execution).

Therefore, even if there is a cross-border element on the private or supply-side, the fact that all entities on the public side remain in one and the same Member State (*ie* MS_A) allow for the legal and economic relationships to remain within the framework of a single legal system and economic context. Importantly, from a legitimacy perspective, any payments that CPB₁ obtains, either directly from CA₁ and CA₂ (R₁) or indirectly from Sup₁ (or Sup₃) (R₃), are funds originating and ending up in the budget of the same Member State (loosely speaking). This is unlikely to trigger significant debate about the alternative ways in which CPB₁ is financed, at least from the perspective of the legitimacy/desirability of (direct and indirect) payments for the provision of centralised procurement services (section 3).

2.2. Basic joint/collaborative procurement scenario

Similarly, if MS_B encourages or requires some of its contracting authorities (CA₃ and CA₄) to engage in joint/collaborative public procurement, there are various economic and legal relationships to consider.

- Firstly, it is likely that CA₃ and CA₄ will need to engage in some public-public cooperation relationship (R₄) before they can tender, enter into and call-off within FWA₂. In this regard, R₄ will be regulated under the domestic public or contract law applicable in MS_B. In this case, it is more likely that it is regulated by public law rather than contract. In many EU jurisdictions, this will

indeed be a much regulated administrative law relationship of delegation or collaboration. In other Member States, though, this could be a completely unregulated relationship—or some Member States may not even require a formal legal relationship as such. The difficulty with conceptualising this relationship in abstract terms is that it can imply different levels of intensity for each of the cooperating contracting authorities. By contrast with the centralised procurement scenario (2.1 above), when a CPB is not involved, CA₃ and CA₄ need to reach *ad hoc* agreements on a large number of issues and, unless they are repeated players, the setting up of R₄ may take significant time even if no legal barriers are present.

- Independently of the relationship underlying the collaboration between CA₃ and CA₄, they need to set up a contractual framework (R₅) which will be FWA₂ itself. This is a contractual relationship between CPB₃ and CPB₄ (or one of them, depending on how they instrument it and how it relates to R₄) and Sup₂. This will set out the main conditions of the contractual (sub)relationship that ensues with each call-off by each contracting authority (which will either be also covered by R₅, or regulated by an additional contractual relationship, depending on the treatment of FWA and call-offs in the domestic law of MS_B). Should the supplier not be based in the same Member State (Sup₃), FWA₂ will usually resolve any issues of cross-border conflict of laws in R₅ by imposing explicit clauses of submission of Sup₃ to the law of MS_B (in an equivalent manner to what is discussed regarding FWA₁ above).

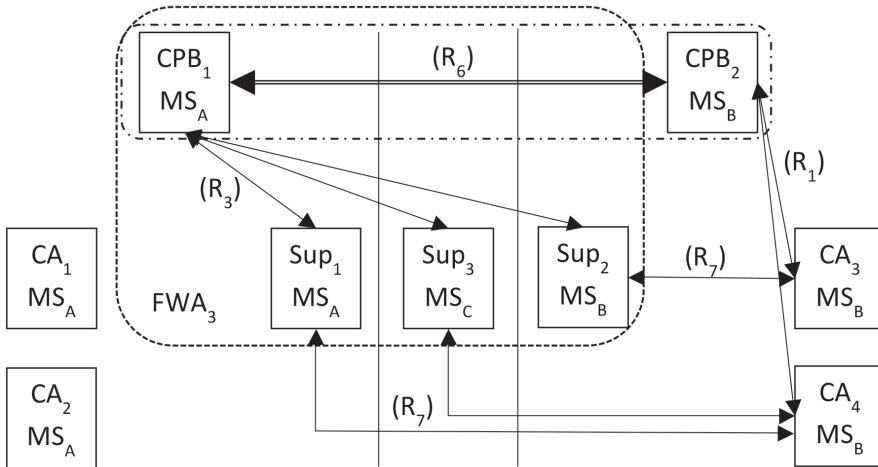
Compared to the centralised example (2.1 above), this scheme reduces the need for a string or layer of legal and economic relationships, and both CA₃ and CA₄ can have a direct (full) contractual relationship with Sup₂ (or Sup₃). Once more, even if there is a cross-border element on the private or supply-side, the fact that all entities on the public side remain in one and the same Member State (MS_B) allow for the legal and economic relationships to remain within the framework of a single legal system and economic context. In this case, the flows of funds are also more direct (and potentially transparent, or at least more easily traceable), which should also alleviate any concerns as to the legitimacy of engaging in these alternative public procurement strategies (section 3).

2.3. Cross-border collaborative/joint procurement scenario

Further to the previous discussion, introducing a cross-border element on the public side will alter most of the analysis above (2.1 and 2.2) in significant ways, which are explored in detail in the following sections (3 and 4). For the purposes of our theoretical case study and to keep the scenario as simple as possible, figure 3 represents and the following discussion describes the situation if both MS_A

and MS_B require or push for the use of the centralised purchasing services of their respective CPB and, in turn, CPB_1 and CPB_2 decide to collaborate for the cross-border procurement of specific goods. In the example, we will assume that the cooperation implies the establishment of a single FWA_3 to be administered by CPB_1 in MS_A , from which CAs in MS_B will be allowed to call-off. The discussion will focus only on the implications for contracting authorities in MS_B , given that for those of MS_A the change should not be significant (particularly from a legal perspective) because their scheme remains entirely domestic as far as they are concerned (with the only possible exception of any share of funds or revenues between CPB_1 and CPB_2). The example also assumes that FWA_3 , being a larger framework contract, requires participation of more than one supplier within the framework. This serves to illustrate a larger number of cross-border issues in our discussion. For the purposes of the simplicity of the theoretical scenario, and in order to overcome any difficulties created by this cross-border element on the private or supply side, FWA_3 includes clauses subjecting suppliers to the law of MS_A , exactly as in the case of FWA_1 .

Figure 3. Scenario involving centralised public procurement in both Member States A and B and joint/collaborative public procurement between CPBs of A and B, under framework agreement operated by A on which contracting authorities of B can call-off



In this scenario, the following new relationships arise:

- R_6 : The establishment of the cross-border collaborative mechanism between CPB_1 and CPB_2 requires entering into an agreement that conceptually mirrors that of any other joint procurement strategy (R_4), but presents a significant legal

challenge due to its cross-border nature. One assumption would be that this can simply take place contractually, or even informally (this latter possibility is discussed in more detail below, 2.4). However, this raises an issue around the obligation to comply with international public and private law to regulate the implications of such dealings. Indeed, in many EU jurisdictions, setting up such a procurement architecture would require the establishment of an international public-public institutional relationship (possibly by means of an international treaty), which raises issues of international public law, constitutional law and administrative law that so far have been non-existent, or only affected relatively marginal cases²¹ (all these legal issues are addressed in detail below, in section 4). Even setting legal constraints aside, this will be difficult to organise because of the many competing political and commercial interests (discussed in section 3 below). This will likely *prevent* many a cross-border joint/collaborative procurement initiative.

- However, for the purposes of laying out the scenario in its entirety, it must be emphasised that, once R_6 is established, contracting authorities in MS_B will have a (public-public or contractual) relationship with their domestic CPB_2 (R_1), but with the peculiarity that CPB_2 will not administer the FWA_3 . This will raise issues of communication between the end user CA and the entity administering the FWA_3 (that is, CPB_1), which will either need to be addressed under the CPB_1 - CPB_2 relationship (R_6), or through direct relationships between users and framework administrator, which would raise similar issues as those discussed for R_6 .²²
- In their call-offs, CA_3 and CA_4 would be entering into contractual arrangements with the suppliers included in the FWA_3 (R_7). The difficulty in these call-offs will be that, even for those that seem to be domestic (*ie* call-offs from Sup_2 based in MS_B), the legal situation is different than under a purely domestic framework. In this scenario, FWA_3 includes clauses subjecting it to the law of MS_A . This triggers the issue whether the contractual relationships derived from the call-offs will also be subjected to the law of MS_A or if they can (or indeed must) be subjected to the law of MS_B . This will be particularly

²¹ This legal difficulty was behind the approval of a special regime for European groupings of territorial cooperation (EGTCs). A map of the existing EGTCs is available at https://portal.cor.europa.eu/egtc/Register/Documents/2465_egtc_map.pdf (visited 15.02.2016). For their legal regime, see Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) [2006] OJ L 210 19–24. See also Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings [2013] OJ L 347 303–319.

²² See below regarding discussion of relationship R_{1B} in case of informal relationship R_{6B} .

relevant in Member States where contracting authorities are not free to enter into choice of law decisions, or where compliance with domestic public contracts legislation (or some of its rules) is a matter of public interest or public policy. These are non-trivial issues (below, section 4).

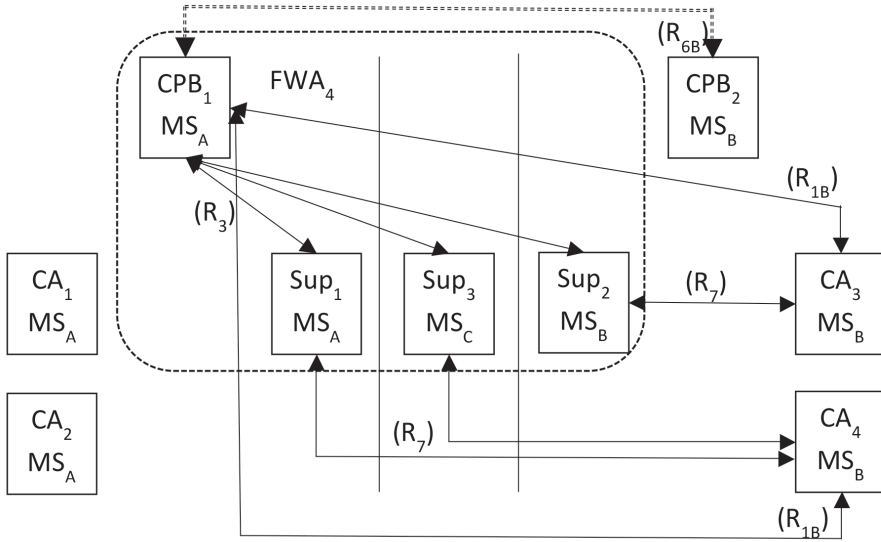
- Moreover, if nothing is changed in the way the FWA₃ provides revenue to CPB₁ as compared to FWA₁, every time there is a call-off, or periodically, the suppliers included in the FWA₃ will be paying rebates or fees to CPB₁ (R₃). For CA₃ and CA₄, this will imply a transfer of economic rents (or implicit payments) to CPB₁ for its services. Whether this revenue will be shared with CPB₂ or not will depend on their specific arrangements (R₆), but this can trigger both legal and maybe more important, political repercussions that deserve some careful consideration.

The following sections will zoom-in on the issues mentioned above and that derive from the cross-border nature of the collaborative procurement. Before proceeding to such analysis, though, it is worth considering an alternative ‘soft’ solution whereby, in order to avoid having to establish R₆ and the legal risks it entails, CPB₁ and CPB₂ simply ‘coordinate their behaviour informally’ in a way that allows for the same functional results, but which excludes CPB₂ from the formalised legal structure.

2.4. ‘Informal’ cross-border collaborative/joint procurement scenario

As represented in figure 4, one of the possibilities open to CPB₁ and CPB₂ (at least conceptually) is for them to simply cooperate in an informal way (R_{6B}) that allows CPB₁ to create a FWA₄ ultimately usable by the CAs of MS_B (formally only different from FWA₃ in that CPB₂ is not a party, or possibly even named in the agreement). The main difference would be that each of the CA of MS_B would then establish a direct relationship with CPB₁ (R_{1B}), which will also be an international relationship that needs to be regulated (existing rules are discussed in section 4) and that, in case it generates revenue for CPB₁ (particularly if they are not only implicit via the suppliers, through R₃), will raise the same or even aggravated issues concerning the payments for the centralised procurement services provided cross-border mentioned in previous scenarios.

Figure 4. Scenario involving centralised public procurement in both Member States A and B and informal relationship to foster ‘soft’ collaborative public procurement between CPBs of A and B, under framework agreement operated by A on which contracting authorities of B can directly call-off



Once all these possibilities and open issues are laid out, the following sections proceed to their analysis from a political and economic (section 3) and a legal perspective (section 4).

3. Political and economic implications of cross-border collaborative procurement

In view of the issues sketched above, it is submitted that the main political and economic implications of cross-border collaborative procurement are hard to assess as a solid reality, and that its take up will be affected in diverse ways in different Member States. It is submitted that the main levers for the facilitation or the push-back of these new strategies will be of a legal nature (see section 4 below). Beyond legal issues, though, it is not too hard to guess that those areas of the European Union where there is stronger cross-border penetration in existing procurement practices, or closer similarity (particularly, linguistic), will be more open to cross-border collaboration. It is also not hard to guess that institutional robustness will also be a highly relevant factor, although it can cut both ways. On the one hand, countries with stronger procurement institutions

or a better resourced CPB may be in a good position to undertake risky and complex procurement strategies. On the other hand, such institutional robustness may make the system less flexible to change, particularly where there are significant legal difficulties. Indeed, it should be stressed that there are already important operational difficulties derived from resistance to political pressure for collaborative and centralised public procurement in purely domestic settings,²³ not least due to concerns about the lack of flexibility and actual innovation in particularly large framework agreements, as well as the negative impacts on SME participation that can derive from excessive aggregation of demand as a result of the collaborative procurement exercise.²⁴ Therefore, in a counter-intuitive way, more developed procurement systems may be more reluctant to engage in cross-border collaborative procurement when that is perceived to damage other types of *smart* procurement and, in particular, efforts to engage in innovative, green or socially-oriented procurement.

Thus, it may be easier to push for centralised (and then cross-border) procurement in countries with weak existing procurement structures, particularly if the creation of a new CPB absorbs a significant volume of resources and if its use is made mandatory for all or a significant part of (smaller) contracting authorities—which is a clearly probable strategy in countries in need of significant institutional reform and capacity building.²⁵ Thus, there are uncertainties as to the way in which existing practice and institutional robustness can affect the uptake of cross-border collaborative procurement in different Member States, but it seems fair to say that they will create significant political difficulties within the public sector across the board, even if *only* strictly from a perspective of institutional design and interaction between bodies of civil servants and politicians.

Moving beyond these relatively obvious issues of political and institutional constraints, it is harder to assess whether there is a net positive or negative political and economic case for cross-border collaborative procurement that can be made at this stage. There are competing pressures on both dimensions and many of the issues are strongly intertwined. It is submitted that, the most salient issues seem to revolve around three aspects:

First, any political enthusiasm for the achievement of savings and a higher degree of professionalization by means of centralised and collaborative procurement needs to be counter-balanced with the impact it has on the internal

²³ C Mason & J Meehan, 'Collaborative public procurement: institutional explanations of legitimised resistance' (2016) 22 *Journal of Purchasing & Supply Management* forthcoming.

²⁴ Ibid.

²⁵ *Brainstorming on the possible development of an EU policy on aggregation* (n 6) 9. This also seems to be part of the *Public Procurement Action Plan* (n 15) annex 1.

organisation of the State and its administration,²⁶ particularly if these techniques are not only encouraged, but rather imposed or mandated.²⁷ Centralisation goes against regional and/or local devolution or empowerment in many ways, and cross-border collaboration can only amplify these issues²⁸—which can trigger significant opposition, particularly if issues of budgetary allocation are unclear, or if procurement strategies are seen to creep over the field of substantive political decision-making. It can also raise difficult arguments of democratic legitimacy and responsibility of CPBs if they are seen as operating in a purely commercial manner that is too far remote from political checks and balances (in the end, it would amount to public intervention in the economy, which is not perceived as a desirable feature in all Member States), and this can be compounded where the CPB is subjected to general rules applicable to economic activity and to the exercise of buying power²⁹—which can open new fronts of litigation against the public sector, particularly by disappointed bidders, with potentially far-reaching implications. At this level, issues of impacts on self-government, accountability and legitimacy of public economic initiative and intervention seem particularly hard to navigate.

Second, there is a significant element of funding and redistribution implicit in centralised and collaborative procurement, as the allocation of costs and benefits does not follow standard accounting and management tools and the public sector can be faced with difficult questions as to where the financial burden lies, and who actually benefits from any economic efficiencies derived from centralisation and (cross-border) collaboration. Indeed, it is not only difficult to report the financial and efficiency benefits and costs of each specific project and the collaborative strategies more generally³⁰ but, particularly in the case of cross-border collaborative procurement, new arguments on the legitimacy or

²⁶ H Walker, F Schotanus, E Bakker & C Harland, 'Collaborative Procurement: A Relational View of Buyer–Buyer Relationships' (2013) 73(4) *Public Administration Review* 588–598. See also C Gobbi & J Hsuan, 'Collaborative purchasing of complex technologies in healthcare: Implications for alignment strategies' (2015) 35(3) *International Journal of Operations & Production Management* 430–455.

²⁷ J Muir & D Mullins, 'The Governance of Mandated Partnerships: The Case of Social Housing Procurement' (2015) 30(6) *Housing Studies* 967–986.

²⁸ For discussion, see B Brezovnik, Ž J Oplotnik & B Vojinović, '(De)Centralization of Public Procurement at the Local Level in the EU' (2015) 46 *Transylvanian Review of Administrative Sciences* 37–52.

²⁹ See A Sanchez-Graells and I Herrera Anchustegui, 'Revisiting the Concept of Undertaking from a Public Procurement Law Perspective : A Discussion on *EasyPay* and *Finance Engineering*' (2016) 37(3)

European Competition Law Review 93–98.fanc

³⁰ Generally, see C Ryan & P Walsh, 'Collaboration of Public Sector Agencies: Reporting and Accountability Challenges' (2004) 17(7) *International Journal of Public Sector Management* 621–631; and SN Kioko et al, 'Why Public Financial Management Matters' (2011) 21 (suppl 1) *Journal of Public Administration Research and Theory* i113–i124.

desirability of certain financial flows are likely to arise—especially if they are seen as pushing for a ‘solidarity’ that seems to be very much in crisis in many areas of European policy.³¹ If it is not possible to establish in an uncontroversial way that cross-border collaborative procurement lends immediate economic benefits to all the parties involved, or if there is a perception that (in particular, the CPB of) a given Member State is benefitting disproportionately, this could lend itself to questions as to whether this type of public-public cooperation is preferable to ‘solo’ procurement or even to public-private partnerships with commercial intermediaries able to provide centralised procurement services.

Third, any claims as to reputational gains derived from better economic performance and increased professionalization crucially rest on the need to create a better public understanding of how the procurement function supports the discharge of public duties and how it contributes to achieving public interest goals. It also raises the problem of the long time it takes for the benefits (or problems) derived from public sector reform initiatives to emerge, which can diminish the actual political engagement with issues that are bound to be controversial and difficult to communicate to the public.

Overall, then, it seems that the political and economic case for the promotion of cross-border collaborative public procurement may be less clear-cut than the European Commission seems to assume. This can create difficulties to get the Member States on board for the implementation of any *Action plan on cooperative procurement* in a meaningful way. However, as repeatedly mentioned, it is submitted that the major roadblocks for such a strategy will be of a legal nature, for the reasons discussed below.

4. Legal implications of cross-border collaborative procurement from a conflicts of laws perspective

Previous sections have been highlighting the areas where uncertainty arises as to the legal framework applicable to several of the mediate legal relationships that need to exist in the implementation of cross-border collaborative public procurement in the European Union. This uncertainty was of concern in the run up to the approval of the new 2014 public procurement rules. The point of departure, as clearly emphasised in Recital (73) of Directive 2014/24 was that the ‘[j]oint awarding of public contracts by contracting authorities from different

³¹ The discussion exceeds the scope of this paper. However, for a critical account and background analysis, see E Jones, RD Kelemen & S Meunier, ‘Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration’ (2015) *Comparative Political Studies* 1–25, advanced access available at <http://cps.sagepub.com/content/early/2015/12/11/0010414015617966.abstract> (visited 18.02.2016)

*Member States currently encounters specific legal difficulties concerning conflicts of national laws. Despite the fact that Directive 2004/18/EC^[32] implicitly allowed for cross-border joint public procurement, contracting authorities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding public contracts’.*³³ The Commission intended to remedy such difficulties with the adoption of new rules, particularly Articles 37 to 39 of Directive 2014/24, which deal with centralised, joint and cross-border procurement. The Directive thus further clarifies in Recital (73) that the purpose of those rules is to

determine the conditions for cross-border utilisation of [CPBs] and designate the applicable public procurement legislation, including the applicable legislation on remedies, in cases of cross-border joint procedures, complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and the Council^[34].

Thus, on the basis of this succinct account, it should be expected for the rules in Articles 37 to 39 of Directive 2014/24 to provide a complete set of ‘conflicts of laws’ rules that addressed all legal uncertainties derived from cross-border collaborative public procurement exercises.³⁵ However, having a close look at the rules included in these provisions, it is clear that very significant legal uncertainties remain.³⁶ The main source of these difficulties is that the conflicts of laws rules established by Articles 37 to 39 of Directive 2014/24 solely cover one of three main legal dimensions or potential clashes (or loopholes) of legal systems derived from their improper coordination.³⁷

³² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134 114–240.

³³ This was, for instance, the case in the construction of the Öresund Bridge between Denmark and Sweden, where contracting authorities involved excluded the possibility of carrying out a proper joint procurement (rather than the two connected procurements they implemented) due to the legal issues it created; see J Busch & S Barlin, ‘Case Comment: The legal framework for cross-border procurements’ (2008) 17(5) *Public Procurement Law Review* NA231–235, NA233.

³⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177 6–16.

³⁵ For a brief overview, see C Risvig Hamer, ‘Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies’ (2014) 23 *Public Procurement Law Review* 201, 209. See also A Sanchez-Graells, *Public procurement and the EU competition rules*, 2nd edn (Oxford, Hart, 2015) 275.

³⁶ Cf S Ponzio, ‘Joint Procurement and Innovation in the New EU Directive and in some EU-Funded Projects’ (2015) *Ius Publicum* 16 and ff, http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf (visited 18.02.2016).

³⁷ There are many other dimensions that could be very relevant, such as tax law, but analysing them would exceed the possibilities of this paper.

First, there could be a clash or loophole in terms of the public procurement rules that apply to cross-border situations, which are taken here to include issues of remedies for disappointed bidders in case of their breach, as well as remedies against Member States in case of infringement of EU law. Second, there could be an issue of coordination of the public/administrative (or contract) law that controls relationships between public authorities or entities. And, third, coordination problems could also concern the public or private contract law applicable to the relationships between contracting authorities and suppliers. In brief, it is fair to say that the rules in Articles 37 and 39 of Directive 2014/24 are only concerned with the first of these dimensions, although they include an obscure allowance for some issues in the second dimension—and simply assume that the existing solutions in the area of contract law under Regulation (EC) No 593/2008 suffice and apply to these situations in an unproblematic way, which is by no means uncontroversial.³⁸

The following is a stylized account of the legal rules and the way they relate to the legal relationships indicated in sections 2.3 and 2.4, for which the notation in figures 1 to 4 is retained.

- *Relationships between CPBs and CAs* (R_i): Art 37(1) of Directive 2014/24 establishes the specific authorisation for MS to allow or impose the use of CPB services for the acquisition of specific supplies (or services or works), either by acquiring them directly from the CPB, or by using contracts, dynamic purchasing systems or FWA concluded by the CPB. In these cases, the CA is only responsible to comply with EU procurement rules for the parts of the execution of the contract that it carries out directly (*ie* call-offs).

Remarkably, Art 37(4) of Directive 2014/24 allows for contracting authorities to *directly* award public service contracts for the provision of centralised purchasing activities (including ancillary purchasing activities, which can trigger remuneration) to the CPB. That is, R_i can be established without public tendering and the establishment of this relationship is only covered by the EU rules inasmuch as liability for compliance with EU procurement rules is concerned, which is sorted out by discharging the CA from any responsibilities and liability except for the parts that it carries out directly (*ie* call-offs).

³⁸ Cf. JB Auby, M Mirschberger, H Schröder U Stelkens & J Ziller, *ReNEUAL Model Rules on EU Administrative Procedure*, Book IV—Contracts (2014) 178 where they indicate that '[t]he reference to Regulation 593/2008 on the law applicable to contractual obligations (Rome I) ... are appropriate to be applied *mutatis mutandis* to EU contracts even when not directly applicable: not all EU contracts may be qualified as contracts in "civil and commercial matters", but some may be qualified as contracts in "revenue, customs or administrative matters" in the sense of Article 1(1) of the Rome I Regulation. However there is no reason why the criteria set out in the rules of the Rome I Regulation would not be appropriate to determine the applicable law even in these cases' http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/Book%20IV%20-%20Contracts_online_version_individualized_final__2014-09-03.pdf (visited 18.02.2016).

This is clearly a significant incentive for the use of CPB services, particularly for contracting authorities with limited institutional capability or willing to effectively *outsource* their procurement function to the CPB. However, the rules are insufficient to deal with aspects of public/administrative or contract law applicable to the set up of R_1 . This remains an issue for the law of the Member State and should be relatively unproblematic, except where the CPB engages in activities that may not only trigger liability under the public procurement rules, which the CA may need to shield or insure as a matter of its duty to act legally. Consequently, already at this level, there are unregulated issues that could be potentially relevant and that can chill the CAs willingness to resort to a CPB—although these should not be of first order and should decrease in relevance over time, particularly once the CPB has been established for a while and consolidated its functioning.

- *Cross-border relationships between CPBs and CAs of different Member States* (R_{1B}): Art 39(2) of Directive 2014/24 allows for a relationship equivalent to R_1 to be established directly between the CA of a Member State and a CPB of another.

Article 39(3) of Directive 2014/24 of Directive 2014/24 then subjects all procurement carried out in this manner to the law of the Member State in which the CPB is based. The difficulty in this case is that, under this modality, the '*national provisions of the Member State where the [CPB] is located*' shall also apply to the call-offs carried out by the contracting authority of the other Member State—which will thus be operating under a foreign public procurement law.

This opens the unexplored possibility that contracting authorities of a Member State apply the procurement law and regulations of a different Member State³⁹ which, however, they have traditionally not had *jurisdiction* to do, and which will raise significant costs of information and legal risks despite the commonality in domestic procurement rules deriving from the EU Directives. This may well be legally impossible in a number of Member States and, in any case, in view of the commonality of rules that Directive 2014/24 itself imposes, it could have been avoided by relying on the mutual recognition of EU-compliant procurement decisions.

The reason behind this requirement may have been a well-intended effort not to alter the legal regime under which the suppliers operate, or the remedies available to disappointed bidders. However, it triggers significant issues in case of appeals in the jurisdiction of the CA applying *foreign* rules—would the

³⁹ This seems to be accepted as uncontroversial by S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, Vol. 1, 3rd edn (London, Sweet & Maxwell, 2014) 1175.

courts of the CA's Member State apply the national provisions of the Member State where the CPB is located? Would this, again, not raise important issues of *jurisdiction*, other than the obvious information (and translation) costs and the ensuing legal uncertainty? Conversely, would the implication be that a CA of a Member State can be challenged or sued in front of the courts of the Member State which procurement law is applicable by virtue of the location of the CPB?

Beyond these certainly not trivial issues, as in relation to R_1 , the rules are insufficient to deal with aspects of public/administrative or contract law applicable to the set up of R_{1B} and the same concerns exist. In this case, though, the cross-border dimension of the relationship compounds the risks for the CA relying on the CPB of a different Member State to a level that is clearly of first order (or, in plain words, a 'no go zone').

- *Relationships between CAs of the same Member State for the purposes of 'occasional' joint procurement* (R_4): Art 38(1) of Directive 2014/24 explicitly authorises two or more contracting authorities to perform specific procurements jointly.

Article 38(2) then goes on to establish a regime of joint liability for the fulfilment of their obligations under Directive 2014/24. This joint liability not only applies where all procurement is carried out jointly, but also where '*one contracting authority manages the procedure, acting on its own behalf and on the behalf of the other contracting authorities concerned*'.⁴⁰ Conversely, where only parts of the procedure are carried out jointly, the joint responsibility will only cover those parts, and separate liability will control the remainder of the activities which each contracting authority '*conducts in its own name and on its own behalf*'.

This regime focuses exclusively on issues concerning the first dimension of issues mentioned above and, in particular, solely on issues of liability (and remedies, implicitly) for breach of the EU public procurement rules. It establishes nothing about the public-public administrative (or contractual) relationship that these contracting authorities need to establish (or not, depending on many legal constraints in each Member State). This leaves unanswered questions such as whether public interest clauses in the domestic law of the Member State could deactivate the requirement for joint responsibility, or at least if that would be possible provided the necessary effectiveness of any remedies arising from infringements of EU public procurement law were ensured. It also does not address any issues of contractual law that may be relevant from a purely internal perspective, particularly where contracting

⁴⁰ Which could include R_{6B} if a broad/functional interpretation of 'on behalf of' was adopted, although this is by no means clear at all due to the difficulties in reconciling the rules in Article 38 and those in Article 39.

authorities engaging in occasional joint procurement are subject to different regional rules. Overall, this is primarily a private law-like solution for an issue of inter-administrative cooperation (at least in the vast majority of cases, at least in many Member States). This can once more chill contracting authorities that face uncertainties on any of the dimensions of potential conflict of laws not addressed by Directive 2014/24.

- *Relationships between CAs of different Member States, which include CPBs of different Member States*⁴¹ (R₆): Art 39(1) of Directive 2014/24 establishes that contracting authorities from different Member States may act jointly in the award of public contracts, provided they do not do so ‘*for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in their Member State*’. This single safeguard can be the last nail in the coffin for many cross-border collaborative procurement initiatives because Member States usually require their contracting authorities to comply with their domestic public contracts/public procurement rules as a matter of their duty to *act legally*. Moreover, the reference to ‘conformity with Union law’ can be misleading because it would indicate that Union law can affect such possible requirement to comply with domestic rules (*and only those*) in a way that reduces or excludes it, whereas the principle administrative autonomy enshrined in Article 291(1) of the Treaty on the Functioning of the European Union would point very clearly in the opposite direction.⁴²

Once this hurdle is overcome, if that is possible at all under the specific domestic rules of *all* Member States involved in the cross-border procurement, there is an additional difficulty in terms of CPB participation. As mentioned above, Article 39(3) of Directive 2014/24 establishes that ‘[t]he provision of centralised purchasing activities by a central purchasing body located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located’ (emphasis added). A possible interpretation would be that CPBs must *by necessity* operate exclusively under their own domestic laws, which would neutralise most types of cross-border collaboration among CPBs except in the form considered in this paper—*ie* where one CPB sets up a FWA that allows for the CAs of the other Member State to call-off and, strictly speaking, the other CPB(s) involved do not provide any services of a cross-border nature.

⁴¹ This is uncontroversial, as per the definition included in Art 2(1)(16) of Dir 2014/24, according to which “central purchasing body” means a contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities’.

⁴² See J Schwarze, ‘European Administrative Law in the Light of the Treaty of Lisbon: Introductory Remarks’, in European Parliament, *Workshop on EU administrative law: state of play and future prospects—Briefing Notes* (2011) 22, [http://www.europarl.europa.eu/RegData/etudes/divers/join/2011/453215/IPOL-JURI_DV\(2011\)453215_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/divers/join/2011/453215/IPOL-JURI_DV(2011)453215_EN.pdf) (visited 18.02.2016).

Additionally, there is an open question whether any agreement between CPBs of different Member States would need to comply with Article 39(4) regarding the formalisation of their cooperation (discussed below). If they have to comply with its requirements, the fact that the CPBs belong to different Member States will trigger significant legal complications. Conversely, if they need not comply with Article 39(4), it could be argued that this could in itself be contrary to Article 39(1) of Directive 2014/24 because cooperating CPBs would not be subjected to the same requirements of mandatory (international) public law as other types of CAs. This would not seem to make much sense. Ultimately, then, it is unclear how these two regimes be reconciled, if at all. Are they mutually exclusive or somehow complementary?

Beyond this issue of cross-border CPB involvement on both ends of the cross-border collaborative procurement exercise, Article 39(4) of Directive also falls short of providing a meaningful content to R₆ because it simply establishes that in case of joint cross-border procurement, '[u]nless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement...'. It needs to be stressed that the existence of such international agreements is by no means prevalent. Moreover, the wording of the Directive (in the absence of international treaty, bilateral agreement) simply assumes that it is possible for contracting authorities of different Member States to negotiate outside the framework of international treaties concluded by their respective Member States, which is quite a logical and legal jump. It is submitted that the legal basis of the Directive itself seems insufficient to create a brand new instrument of 'trans-EU public law', or at least that such an interpretation raises significant issues of competence and *ultra vires* when the scope of the EU procurement Directives and their competence basis are assessed in more detail.⁴³

Assuming that concluding such agreements was at all possible, Article 39(4) of Directive 2014/24 continues to establish that such international (non-treaty) agreement between the participating contracting authorities shall determine: '(a) the responsibilities of the parties and the relevant applicable national provisions; [and] (b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or

⁴³ These issues vastly exceed the scope of this discussion. I intend to address them in a related paper soon.

services to be procured, and the conclusion of contracts'.⁴⁴ This does not really provide any meaningful rule of 'conflict of laws' (not even regarding the first dimension identified above) and it definitely does not overcome the significant uncertainties deriving from this unregulated type of 'trans-EU' international agreements between contracting authorities. The only issue clarified by Article 39(4) of Directive 2014/24 is that a '*participating contracting authority fulfils its obligations pursuant to [that] Directive when it purchases ... from a contracting authority which is responsible for the procurement procedure*'—which in itself triggers some issues as to the possibility to argue for the existence of joint liability *by analogy* with Article 38(2) Directive 2014/24 (see above). It does not seem to make much sense to impose joint liability on CAs of the same Member State even if one carries out the procurement on behalf of all of them, while allowing for sole responsibility of the CA that carries out the procurement where the collaboration is of a cross-border nature.

At any rate, the remainder of Art 39(4) is simply an enabling clause that allows contracting authorities to split responsibilities among them '*and determine the applicable provisions of the national laws of any of their respective Member States*' [which can, again, trigger very difficult issues of mandatory public law requirements, which are to be respected as per Art 39(1) of Dir 2014/24], only requiring that the allocation of responsibilities and the applicable national law be referred in the procurement documents for jointly awarded public contracts—which promise to be lengthy, complex and raise manifold issues of translation and access to non-domestic legislation, and therefore this publication can hardly be much of a protection.

In general terms, then, this account should have shown how, of the manifold dimensions and difficulties involved in cross-border joint/collaborative procurement, Articles 37 to 39 of Directive 2014/24 only address a relatively small number of issues at the first dimension of ensuring coordination between the procurement rules of different Member States and liability for breach of EU public procurement rules (albeit not in clear or uncontroversial terms).

They do not create any rules on the second dimension, which concerns coordination of the public/administrative (or contract) law that controls relationships between public authorities or entities. In this regard, Directive 2014/24 only creates legal uncertainty and difficulty concerning the interpretation of

⁴⁴ Art 39(5) of Dir 2014/24 refers to EGTCs (as per Reg 1082/2006, see above fn 21) and indicates that, in these cases, the choice of applicable law to the joint procurement by decision of the competent body of the joint entity is limited to (a) the national provisions of the Member State of the EGTC's registered office, or (b) the national provisions of the Member State where the joint entity is carrying out its activities. This choice of law can be determined on a project-specific or a temporary basis.

the *caveat* in Article 39(1) that '[u]nless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement...'—which creates a novel issue of the possible existence of non-treaty international agreements within the European Union and which may well lead to the emergence of trans-EU public law,⁴⁵ but clearly does not suffice to create it just like that.⁴⁶

They also do not address the third dimension of coordination regarding the public or private contract law applicable to the relationships between contracting authorities and suppliers—and simply assume that the existing solutions in the area of contract law under Regulation (EC) No 593/2008 suffice and apply to these situations in an unproblematic way. This is a rather bold assumption, particularly in countries where public contracts are regulated separately from civil or private contracts. This may very well leave them outside of the scope of application of the Regulation altogether, since its Article 1 clearly establishes that is limited to '*contractual obligations in civil and commercial matters*' and it clearly indicates that '[i]t shall not apply, in particular, to revenue, customs or administrative matters'. Overall, then, the volume and complexity of the legal uncertainty in the background of any cross-border collaborative public procurement procedure, particularly when centralisation is also involved, seems enough to *chill its development* until new and refined legal rules are developed. However, the embryonic trend of emergence of a field of 'trans-EU public law' seems to deserve much more thoughtful consideration.

5. Conclusions

This paper has challenged the European Commission's push for cross-border collaborative public procurement as *the* catalyst to get contracting authorities and Member States to think "Europe" rather than "local", and to approach public procurement from a European perspective. To do so, the paper has laid out several theoretical scenarios for the assessment of the political, economic and in particular legal implications of cross-border collaborative procurement under the rules of Directive 2014/24.

On the basis of that theoretical case study, it has submitted that there are several political, economic and institutional factors to take into account when trying to forecast the likely take up of these types of strategic procurement. Particular attention has been given to tensions between localism/devolution

⁴⁵ This is different, albeit closely related, to the emergence of a European system of international public law. On that, see B De Witte, 'The Emergence of a European System of Public International Law: the EU and its Member States as Strange Subjects' in J Wouters, Pa Nollkaemper & E De Wet (eds), *The Europeanisation of International Law* (The Hague, TMC Asser Press, 2008) 39–54.

⁴⁶ Again, these issues vastly exceed this discussion. I intend to address them in a related paper soon.

and centralisation of procurement decision-making, the acceptance of economic intervention in the market through commercially-oriented central purchasing bodies, issues of legitimacy and desirability of payments derived from centralised procurement, as well as the difficulty of conveying political messages in the area of public procurement—all of which may reduce political enthusiasm or, at least, reduce the perceived value of improved procurement in political terms.

Beyond these considerations, the paper has also submitted that, in any case, the legal deficiencies of the rules laid out in Articles 37 and 39 of Directive 2014/24 make it legally impracticable, if not completely impossible, to implement cross-border collaborative procurement—particularly if central purchasing bodies are involved, and in the absence of a new wave of international agreements between EU Member States. This has prompted some initial considerations as to the embryonic trend of emergence of a field of ‘trans-EU public law’ concerned with addressing these gaps in the current EU legal system. This should serve as a blueprint for future legal research.